

IMPORTANT NOTICE!

American Recovery & Reinvestment Act

**COBRA Provisions Update - Frequently Asked Questions
& Action Plans**

As you are aware, the American Recovery and Reinvestment Act of 2009 was signed into law on Tuesday, February 17, 2009. This new law contains a provision that will have a significant impact on COBRA coverage. This update provides general guidance from your Employee Benefits Team at Andreini & Company to help you understand the impact on your company and employees.

The American Recovery and Reinvestment Act provides qualified COBRA participants with a 65% federal subsidy for up to 9 (nine) months of COBRA coverage for individuals who became eligible for COBRA coverage from September 1, 2008 through December 31, 2009 due to involuntary termination of employment. The bill permits these COBRA individuals to satisfy their COBRA premium by paying only 35% of the premium.

To help employers pay for this premium assistance, plan sponsors are permitted to reduce their payroll taxes to offset the lower premiums paid by qualified beneficiaries. The bill creates a new special election period for those who have not elected COBRA and a new notice requirement to inform individuals about the opportunity to elect COBRA and receive a federal subsidy. The Federal Government has issued a model notice along with some further details explaining how the subsidy will work, who it's intended for and has also clarified some issues brought about from the initial notification.

EFFECTIVE DATE

What is the effective date of the new law?

ARRA is effective February 17, 2009, the day the bill was signed into law. All of the COBRA provisions that have a time frame will be referenced from this day. As for calendar monthly billed programs, the effective date is March 1, 2009.

What happens if an employer has not been able to establish the subsidy program by March 1?

Due to the close effective date many employers have not been able to transition to the subsidy process by March 1, and the subsidy-eligible persons have continued paying their full COBRA premium. The Act contemplates that subsidy amounts that are applicable may not be implemented in the first two months of the program. In that case, the subsequent premiums for the subsidy-eligible persons maybe provided with a refund for the overpayment or receive a credit on one or more subsequent premium statements equal to the accumulated overpayment.

PLANS TO WHICH THE ARRA SUBSIDY PROVISIONS APPLY

What plans does ARRA apply to?

ARRA covers all plans, both insured and self-funded, that are subject to COBRA and state and municipal plans that are subject to the Public Health Service Act which provides provisions parallel to that of COBRA. In addition, the subsidy applies to non-COBRA plans that are subject to state continuation laws that are comparable to COBRA. This includes medical, dental, vision, and prescription coverage and excludes Flexible Spending Accounts.

What if I have fewer than 20 employees?

Federal COBRA does not apply to employers with fewer than 20 employees but some states require employers with fewer than 20 employees to provide "COBRA-like" continuation of coverage plans. If these plans meet certain structural requirements for comparable continuation coverage, employees that are involuntarily terminated and covered by these types of plans will also be eligible for the premium subsidies.

Does ARRA affect State Continuation?

Yes, to the extent that such requirements are "comparable" to the federal COBRA standards. However, this does need clarification: the State continuation coverage laws are subject to the provisions of the Act but there is little guidance in regards to these programs. The Act places the responsibility in the hands of the Insurer for the administration of these provisions but provides no direction on how to do this. For example, how will an Insurer determine if an employee was voluntarily terminated? Is the Insurer supposed to rely on information provided by the employer? Perhaps more importantly, how will the Insurer receive reimbursement from the government? The Insurer does not pay payroll taxes on the Assistance Eligible Individuals. So the reimbursement process outlined in the Act does not address this scenario.

How will we know which state continuation laws are "comparable" to COBRA?

The Conference Committee reports which states have comparable coverage continuation laws. California is one of the states that do provide "comparable" state continuation laws to COBRA.

WHO IS ELIGIBLE

Who is an eligible individual?

An eligible individual is someone who is involuntarily terminated from employment during the period of September 1, 2008 through December 31, 2009 and is eligible to elect COBRA during that time.

Employees with modified adjusted income (MAGI) that exceeds \$250,000 (for joint returns) or \$125,000 (all other filers) will not be eligible for the full premium subsidy. The premium subsidy will be fully phased out for individuals with MAGI of \$145,000/\$290,000

Individuals who exceed these income limits must repay any subsidy he/she received. These repayments are reported on the individual's income tax return.

Individuals may make a permanent election to waive the subsidy.

Individuals that are Medicare eligible at the time of the involuntary termination are not eligible for the subsidy. If a person becomes eligible for Medicare while receiving the subsidy, this subsidy will cease as this is a form of group health coverage.

What does “involuntarily terminated” mean?

Ultimately the employer will need to make the decision regarding the definition of “involuntary”. Persons who are involuntarily terminated from employment are eligible for the subsidy. This is not a term that is defined either in ARRA or in COBRA generally. We may assume that the COBRA ban on persons terminated for “gross negligence” would continue to operate and those persons would not have access to COBRA at all. However, anyone who is laid off, fired or otherwise dismissed from a job involuntarily during the applicable periods would likely be eligible. A reduction in hours, even if this resulted in a loss of coverage, would not trigger eligibility for the subsidy since it does not involve a termination of employment. The key is that the employment relationship must end in order for the person to meet the ARRA standard.

What does this mean for someone already on COBRA?

Individuals who have elected COBRA due to an involuntary termination on or after September 1, 2008 but prior to the date of the enactment are eligible to receive the subsidy on a prospective basis; it is not retroactive to when they first elected COBRA.

What does this mean for those who elected COBRA on or after September 1, 2008 but lost or dropped the coverage prior to the enactment?

These individuals are entitled to elect COBRA during the period beginning on the date of the enactment and ending sixty (60) days after the date on which they are notified of the additional election period.

What rights are available to individuals who do not receive a subsidy, but believe they should have?

There is an appeal process in place with the Department of Labor and the Department of Health & Human Services. The relevant agency must rule on the appeal within 15

business days. Individuals whose appeal is denied may sue under ERISA.

How will the employer know if the beneficiary becomes eligible for other health coverage?

The beneficiary of the subsidy must notify the employer in writing if they become eligible for coverage under a major medical group health plan or Medicare and is subject to significant penalties (110% of the subsidy amount) for failing to do so. The employer is not responsible for this notification.

THE SUBSIDY

How much is the subsidy?

Eligible individuals will receive a 65% premium subsidy and will only have to pay 35% of the full COBRA premium to continue coverage. There is a 2% administrative fee added to premiums by the carriers. This administrative fee will also be split by the subsidy. If the employer is also subsidizing COBRA coverage the federal subsidy is based on the amount the employer obligates the individual to pay. If COBRA coverage cost \$1000 per month but the employer is only charging the individual \$500 per month, the subsidy is based on \$500 per month.

How long can an individual receive the subsidy?

The subsidy is effective for 9 months for COBRA beneficiaries who become eligible March 1, 2009 or through December 31, 2009.

The subsidy will otherwise end when an Assistance Eligible Individual becomes eligible for coverage under a group health plan or Medicare.

If an Assistance Eligible Individual fails to pay for their share of the subsidy, coverage will end.

FUNDING THE SUBSIDY

How does an employer fund the subsidy?

The IRS has revised the Form 941, the quarterly payroll tax return, to add the COBRA subsidy information on lines 12a and 12b. The employer would fill out the Form 941 and include the subsidy payment on line 12a. This would presumably show an overpayment if the plan had no other

employment taxes, and this would be recorded on line 16. The plan representative would check the "Send a Refund" box on

Employer tax information:
www.irs.gov/pub/irs-pdf/p15.pdf
www.irs.gov/pub/irs-pdf/f941.pdf

EMPLOYER OBLIGATIONS

What should employers do? (Recommendations)

1. **Seek legal counsel** – COBRA is a law that is addressed to employers, and employers have the primary responsibility for compliance. The ARRA changes are similar in that employers need to understand them and comply with them on their own. Employers should seek the advice of their own legal counsel as to how the ARRA changes will affect their own plans. While we at Andreini & Company may provide helpful structural and operational support for the new changes, the burden of compliance remains with the employer.
2. **Identify and notify individuals**- An employer will need to identify individuals eligible for COBRA on or after September 1, 2008 and provide notification (see Notice Requirements) to these individuals of their potential new election period and the availability of the premium subsidy.
3. **Develop procedures** - As an employer you should develop procedures to track and report the individuals receiving the subsidy as well as the amount of the premium subsidy being paid.

SPECIAL OPTIONAL BENEFIT ENROLLMENT OPTION

What is the special enrollment option?
ARRA allows (but does not require) an employer to make available to subsidy eligible individuals a lower cost plan option within 90 days of the date of the notice of the plan enrollment option. In order to qualify, the other plan must have a premium that does not exceed the premium in the plan in which the individual is enrolled at the time

line 16. The IRS would then provide a refund to the employer in the amount of the subsidy for that quarter.

the qualifying event occurred and that plan must be offered to active employees of the employer at the time in which the election is made. Consult your insurance carrier for more details on this option. This option is not available in conjunction with state continuation plans.

NOTICE REQUIREMENTS

How will eligible individuals be notified of their right to the subsidy?

Under ARRA, employers or their COBRA Administrator must provide modified election notices or provide separate supplemental notices to all persons who became entitled to elect COBRA continuation coverage during the period beginning on September 1, 2008 and ending December 31, 2009.

When must the notices be provided?

Notices are required to be sent to persons who became qualified beneficiaries within 60 days of enactment (April 18, 2009). The election period for those beneficiaries who became eligible is 60 days from the date the plan administrator provides the required notice.

Has a model notice been created?

Yes. The Department of Labor has created several model notices to help you comply with the requirements of ARRA. Each model notice is designed for a particular group of qualified individuals and contains information to help satisfy ARRA's notice provisions.

To find the Model Notices go to:
www.dol.gov/ebsa/cobramodelnotice.html

MICELLANEOUS

Will late-electing persons be subject to pre-existing condition exclusions?

ARRA protects electing persons (those who were previously eligible for COBRA under the terms of ARRA on or after September 1, 2008 but did not make an election) by not counting any period of non-coverage between September 1, 2008 and February 28, 2009 as a lapse in coverage for determining the HIPAA 63-day gap in

coverage rule (which would allow the imposition of a pre-existing condition).

What if an employer is struggling and is not able to make the whole premium payment including the subsidy?

For an insured case, the failure of the employee to make the full premium payment due would cause a shortfall in premium under the policy that could lead to lapse. If the employer refuses to engage the subsidy and instead continue to collect 100% of the premium from the subsidy eligible COBRA participant, the employer is violating the terms of the Act and the new provisions of COBRA and would be potentially subject to enforcement actions from the IRS and/or the Department of Labor.

Does ARRA make subsidy changes under the Trade Adjustment Act?

Yes. ARRA raises the TAA health care credit under Code Section 35 for persons who meet the requirements of the TAA (someone whose job has been eliminated by virtue of some documented aspect of foreign competition) from 65% to 80% for coverage

months beginning before January 1, 2011. In addition, TAA-eligible persons will continue to receive the credit even if they are not enrolled in a re-training program during the same period (this was a requirement of the prior law). The health coverage involved may be COBRA or a variety of other state and federal programs.

We have a COBRA administrator. Shouldn't they be making sure we comply with the new COBRA provisions?

The burden of compliance ultimately lies with the employer. If you do have a COBRA administrator they may assist you with complying with the new COBRA provisions (identifying Assistance Eligible Individuals, sending COBRA notices, etc.) and depending on the COBRA administrator, they may charge a fee for these services. Don't assume that it is the COBRA administrator's responsibility to comply with the ARRA provisions for you.

Contact your COBRA Administrator to discuss how they can assist you.

For more information contact someone from your Andreini & Company Employee Benefits Team